A

ALVIN LEONG WAI KUAN & ORS v. MENTERI KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN & ORS AND OTHER APPLICATIONS

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
B [JUDICIAL REVIEW NO: BA-25-52-08-2018,
BA-25-56-09-2018 & BA-25-72-11-2018]
20 MARCH 2020

C ***CONSTITUTIONAL LAW:*** *Judicial power – Exercise of judicial power – Application for order of certiorari to quash Minister's decision allowing housing developer's appeal for extension of period for delivery of vacant possession – Whether court has judicial power to review Minister's decision – Whether reg. 12 of Housing Development (Control and Licensing) Regulations 1989 ousted court's judicial power under art. 121(1) of Federal Constitution ('FC') – Whether basic structure of FC*
D *regarding doctrine of separation of powers altered – Whether there was encroachment on court's judicial power – Whether impugned part invalid pursuant to art. 4(1) of FC – Whether applicants deprived of fundamental right of access to justice guaranteed by art. 5(1) of FC – Whether ultra vires s. 24(1) and (2)(a) to (j) of Housing Development (Control and Licensing) Act 1966*

E ***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Application for order of certiorari to quash Minister's decision allowing housing developer's appeal for extension of period for delivery of vacant possession – Whether court has judicial power to review Minister's decision – Whether reg. 12 of Housing Development (Control and Licensing) Regulations 1989 ('HDR') expressly provides Minister's*
F *decision to be final – Whether case of Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar & Anor And Other Appeals had retrospective or prospective effect – Whether Controller of Housing could exercise any power under reg. 11(3) of HDR to extend period – Whether reg. 11(3) of HDR ultra vires Housing Development (Control and Licensing) Act 1966 ('HDA') and was void – Whether*
G *Minister's decision constituted illegality – Whether developer could rely on s. 2(2) of HDA – Whether applicants could claim for liquidated and ascertained damages*

LAND LAW: *Vacant possession – Delivery of – Extension of time – Application for order of certiorari to quash Minister's decision allowing housing developer's appeal for extension of period for delivery of vacant possession – Whether court has*
H *judicial power to review Minister's decision – Whether reg. 12 of Housing Development (Control and Licensing) Regulations 1989 ('HDR') expressly provides Minister's decision to be final – Whether case of Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar & Anor And Other Appeals had retrospective or prospective effect – Whether Controller of Housing could exercise any power under reg. 11(3)*
I *of HDR to extend period – Whether reg. 11(3) of HDR ultra vires Housing Development (Control and Licensing) Act 1966 ('HDA') and was void – Whether Minister's decision constituted illegality – Whether developer could rely on s. 2(2) of HDA – Whether applicants could claim for liquidated and ascertained damages*

The applicants in these three judicial review applications ('three applications') had purchased 'service apartments' ('parcels') in 'Dreamcity Residence' ('building'). The applicants and the developer of the building ('third respondent') had entered into sale and purchase agreements regarding the parcels ('SPA'). Clause 25.1 of the SPA provides that the third respondent shall deliver vacant possession of the parcel to the applicants within 42 calendar months from the date of the SPA. The third respondent sent a letter to the Controller of Housing ('second respondent') and applied to extend the 42 months period to a period of 59 months. The second respondent partially allowed the third respondent's application and extended the 42 months period to a period of 54 months. The third respondent appealed to the Minister of Housing and Local Government ('first respondent') against the second respondent's decision. The first respondent allowed the third respondent's appeal and extended the 42 months period to a period of 59 months. These three applications by the applicants sought the following relief, among others, against the first, second and third respondents (i) an order of *certiorari* to quash the first respondent's decision; and (ii) a declaration that (a) the first respondent's decision was void under the Housing Development (Control and Licensing) Act 1966 ('HDA'); (b) reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (HDR) was *ultra vires* HDA and was void; and (c) the applicants had a right to claim for liquidated and ascertained damages (LAD) pursuant to the SPA from the third respondent. The issues that arose were (i) whether the court had the judicial power to review the first respondent's decision notwithstanding that reg. 12 of the HDR had expressly provided that the first respondent's decision 'shall be final and shall not be questioned in any court'; (ii) whether the Federal Court judgment in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar & Anor And Other Appeals* ('*Ang Ming Lee*') had retrospective or prospective effect; (iii) whether the second respondent could extend the 36 months period; (iv) whether the first respondent's decision was valid; (v) whether the third respondent could rely on s. 2(2) of the HDA; and (vi) could the applicants claim for LAD based on the 36 months period.

Held (allowing applications):

(1) Reg. 12 of the HDR which states that the 'decision of the Minister ... shall be final and shall not be questioned in any court' had ousted the court's judicial power under art. 121(1) of the Federal Constitution ('FC') to review the validity of any decision of the Minister on appeal to the Minister against a decision of the Controller of Housing made pursuant to regs. 3(3), 4(1), 5(4), 9(2) and 11(3) of the HDR. The impugned part had altered the basic structure of the FC regarding the doctrine of separation of powers between the Executive, Legislature and Judiciary (alteration) by encroaching into the exclusive domain of the court's judicial power under art. 121(1) of the FC. The impugned part was therefore invalid pursuant to art. 4(1) of the FC only to the extent of the alteration (inconsistency with art. 121(1) of the FC).

A Consequently, the court had the judicial power under art. 121(1) of the FC to decide these three applications regarding the validity of the first respondent's decision. The impugned part also deprived the applicants of their fundamental right of access to justice as guaranteed by art. 5(1) of the FC which provides that no person shall be deprived of his or her B life or personal liberty save in accordance with the law. (paras 22 & 23)

(2) Section 24(1) and (2)(a) to (j) of the HDA do not expressly empower the first respondent to make a subsidiary legislation which ousted the court's jurisdiction to decide any decision of the first respondent. This court was unable to find that by necessary implication, s. 24(1) and (2)(a) to (j) of C the HDA enabled the first respondent to make the impugned part. Furthermore, in providing for s. 24(1) and (2)(a) to (j) of the HDA, it was inconceivable for Parliament to have intended for the first respondent to make delegated legislation which encroached into the court's judicial power enshrined in art. 121(1) of the FC. Accordingly, D both literal and purposive interpretations of s. 24(1) and (2)(a) to (j) of the HDA do not enable the first respondent to make the impugned part in reg. 12 of the HDR. As such, the impugned part was *ultra vires* s. 24(1) and (2)(a) to (j) of the HDA and void under s. 23(1) of the Interpretation Acts 1948 and 1967 ('IA'). (para 25)

E **(3)** The Federal Court in *Ang Ming Lee* had not expressly ruled that its decision could only have prospective effect. Hence, in accordance with the general rule, the judgment in *Ang Ming Lee* had retrospective effect and applied to these three applications. There were no exceptional circumstances for the doctrine of prospective overruling to apply to the F decision in *Ang Ming Lee*. On the contrary, the object of HDA and HDR is to protect a 'homebuyer' (as defined in s. 16A of the HDA). Accordingly, in line with the purpose of HDA and HDR, it was in the interest of homebuyers for the judgment in *Ang Ming Lee* to be given retrospective effect. (para 29)

G **(4)** As a matter of *stare decisis*, the Federal Court's judgment in *Ang Ming Lee* was binding on this court and premised on that, reg. 11(3) of the HDR was invalid and the second respondent could not therefore exercise any power under reg. 11(3) of the HDR to extend the 36 months period. In addition, reg. 11(3) of the HDR (the basis for the first and second H respondent's extensions) could not be an exception to the SPA prescribed in reg. 11(1) of the HDR (statutory SPA). There was nothing in reg. 11(3) which provides that the reg. 11(3) of the HDR shall override the statutory SPA as prescribed mandatorily by reg. 11(1) of the HDR. Accordingly, the second respondent could not invoke I reg. 11(3) of the HDR to 'waive or modify' the 36 months period in the statutory SPA. (paras 30 & 32)

(5) There was nothing in the HDR which empowered the first respondent to extend the 36 months period in the statutory SPA. Accordingly, there was no lawful basis to make the first respondent's decision and the first respondent's decision constituted an illegality. Even if the first respondent had the power under the HDR to extend the 36 months period, the first respondent should have given all purchasers of the parcels in the building a right to be heard before making the first respondent's decision. Hence, there was procedural impropriety when the first respondent's decision was made. In view of the illegality and procedural impropriety, this court had no hesitation to exercise its discretion to issue a *certiorari* order to quash the first respondent's decision. (paras 35 & 36)

(6) The third respondent submitted that if the court quashed the first respondent's decision, the court should remit the question of extending the 36 months period to the first respondent under s. 2(2) of the HDA ('remittance order'). The remittance is in effect a court order of *mandamus* to compel the first respondent to consider exercising the first respondent's powers under s. 2(2) of the HDA. This court could not issue a *mandamus* order in these three applications because the two following conditions of s. 44(1) of the Specific Relief Act 1950 ('SRA') was not satisfied as no application for the remittance order had been made by a person 'whose property, franchise or personal right would be injured by the ... doing, as the case may be, of the said specific act'. The remittance order was also not consonant to 'right and justice' as required by proviso (c) to s. 44(1) of the SRA. If the court had granted the remittance order, this would defeat the applicants' rights under the statutory SPA which had been prescribed mandatorily by reg. 11(1) of the HDR. (paras 37 & 38)

(7) By reason of reg. 11(1) of the HDR, the 36 months period had been prescribed mandatorily in the statutory SPA. If the applicants were not entitled to claim LAD premised on the 36 months period, the mandatory effect of reg.11(1) of the HDR would be circumvented. The object of the HDA and HDR is to protect homebuyers. One manner to achieve this object is to ensure that the terms and conditions of the SPA is not drafted in a lopsided manner, which favoured unjustly housing developers (at the expense of homebuyers). Hence, the statutory SPA is provided in reg. 11(1) of the HDR. If the above declaration was not granted, the object of HDA and HDR would be defeated. Thus, this court exercised its discretion under O. 41 of the SRA and O. 15 r. 16 of the Rules of Court 2012 to grant a declaration that the applicants were entitled to claim LAD based on the 36 months period. (para 41)

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Bank Kerjasama Rakyat Malaysia Bhd v. Koperasi Amanah Pelaburan Bhd [2019] 1 LNS 1099 HC ***(refd)***

Barisan Arena Sdn Bhd v. Perbadanan Prima Malaysia [2019] 1 LNS 1773 HC ***(refd)***

Birmingham Corporation v. West Midland Baptist (Trust) Association (Inc) [1969] 3 All ER 172 ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Ang Ming Lee & Ors And Other Appeals [2018] 9 CLJ 640 CA ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

National Westminster Bank Plc v. Spectrum Plus Ltd & Ors [2005] 4 All ER 20 ***(refd)***

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2020] 1 CLJ 1 FC ***(refd)***

PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat And Another Case [2017] 5 CLJ 526 FC ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Sri Damansara Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Ors [2020] MLJU 170 ***(refd)***

Tan Kang Hai v. Slimming Sanctuary Sdn Bhd [2016] 1 LNS 595 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 418A

Federal Constitution, arts. 4(1), 5(1), 121(1), 160(2)

Housing Development (Control and Licensing) Act 1966, ss. 2(2), 16A, 24(1), (2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (ia), (j)

Housing Development (Control and Licensing) Regulations 1989, regs. 3(3), 4(1), 5(4), 9(2), 11(1), (3), (1A), (1B), 12

Interpretation Acts 1948 and 1967, ss. 2(1)(e), 3, 23(1)

Perumahan Rakyat 1Malaysia Act 2012, s. 73(b)

Rules of Court 2012, O. 15 r. 16

Specific Relief Act 1950, ss. 41, 44(1)(a), (b), (c), (d), (e)

(Judicial Review No: BA-25-52-08-2018)

For the applicants - Samreet Singh & Yong Wei Sang; M/s WS Yong & Co

For the 1st & 2nd respondents - Liew Horng Bin; SFC

For 3rd respondent - Rajasegaran Karruppiah & Kalvinder Singh Bath; M/s A Rahim & Co

(Judicial Review No. BA-25-56-09-2018)

For the applicants - Frank Loh Chun Hoo & Siti Syafiqah Sofia Mohd Saufi; M/s Chui, Yap & Co

For the 1st & 2nd respondents - Liew Horng Bin; SFC

For 3rd respondent - Rajasegaran Karruppiah & Kalvinder Singh Bath; M/s A Rahim & Co

(Judicial Review No. BA-25-72-11-2018)
For the applicants - Godfrey Thomas Fernandez; M/s GT Fernandez & Co
For the 1st & 2nd respondents - Liew Horng Bin; SFC
For 3rd respondent - Rajasegaran Karruppiah & Kalvinder Singh Bath; M/s A Rahim & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Kian Kheong J:

Introduction

[1] The applicants (applicants) in these three judicial review applications (three applications) have purchased "service apartments" (parcels) in "Dreamcity Residence", Mines Resort City, Seri Kembangan, Selangor Darul Ehsan (building).

[2] The respondents in these three applications are as follows:

(i) the first respondent (first respondent) is the Minister of Housing and Local Government;

(ii) the controller of housing is the second respondent (second respondent); and

(iii) the third respondent (third respondent) is the developer of the building.

[3] The applicants and third respondent have entered into sale and purchase agreements regarding the parcels (SPAs).

[4] Clause 25(1) of the SPA (cl. 25(1)) provides that the third respondent shall deliver vacant possession of the parcel to the applicants within 42 calendar months from the date of the SPA (42 months period).

[5] The third respondent sent a letter dated 7 September 2016 to the second respondent and applied to extend the 42 months period to a period of 59 months (third respondent's application).

[6] In a letter dated 17 October 2016 (second respondent's decision), the second respondent partially allowed the third respondent's application and extended the 42 months period to a period of 54 months (54 months period).

[7] The third respondent appealed to the first respondent against the second respondent's decision by way of a letter dated 21 October 2016 (third respondent's appeal).

[8] The first respondent sent a letter dated 19 October 2017 to the third respondent (first respondent's decision) which allowed the third respondent's appeal and extended the 42 months period to a period of 59 months (59 months period).

A **Three Applications**

[9] These three applications seek the following relief, among others, against the first, second and third respondents (collectively the "respondents"):

B (i) an order of *certiorari* to quash the first respondent's decision; and

(ii) a declaration that:

(a) the first respondent's decision is void under the Housing Development (Control and Licensing) Act 1966 (HDA);

C (b) reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (HDR) is *ultra vires* HDA and is void; and

(c) the applicants have a right to claim for liquidated and ascertained damages (LAD) pursuant to the SPA from the third respondent.

D **[10]** Vazeer Alam bin Mydin Meera J (as he then was) granted leave for the applicants to proceed with the three applications.

[11] When I perused the cause papers regarding the three applications, I noticed that the 42 months period might be inconsistent with cl. 25(1) of Schedule H to HDR (Schedule H) (which provides for developers to deliver E vacant possession of parcels to their purchasers within 36 calendar months from the date of the sale and purchase agreements (36 months period)). Consequently, I informed learned counsel for the applicants and respondents that cl. 25(1) might be inconsistent with Schedule H (inconsistency). I then gave the applicants and respondents a right to file further affidavits and F supplemental written submission regarding the effect of the inconsistency (if any) on the three applications. I have taken the above course of action because all the parties in the three applications have a right under the second rule of natural justice to be heard before this court decides on the effect of the inconsistency (if any) which is raised by the court (not by the parties) - please see *Tan Kang Hai v. Slimming Sanctuary Sdn Bhd* [2016] 1 LNS 595; G [2016] 5 MLRH 651, at (11(2)).

Issues

[12] The following questions arise in these three applications:

H (i) whether the court has judicial power to review the first respondent's decision notwithstanding that reg. 12 HDR has expressly provided that the first respondent's decision "shall be final and shall not be questioned in any court". This novel issue concerns the application of:

(a) the supremacy of the Federal Constitution (FC) as enshrined in I art. 4(1) FC;

(b) the doctrine of basic structure of FC;

(c) the doctrine of separation of powers and the court's exclusive judicial power as laid down in art. 121(1) FC;

(d) a person's fundamental right of access to justice as guaranteed in art. 5(1) FC; and

(e) the first respondent's statutory power to make HDR under s. 24(1) and (2)(a) to (j) HDA and the doctrine of *ultra vires* regarding subsidiary legislation as embodied in s. 23(1) of the Interpretation Acts 1948 and 1967 (IA);

(ii) does the recent Federal Court's judgment in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 has retrospective or prospective effect? In this regard, when can a Malaysian court apply the doctrine of prospective overruling (where the court's judgment or order can only have prospective effect)?;

(iii) if *Ang Ming Lee* has retrospective effect:

(a) can the second respondent lawfully extends pursuant to reg. 11(3) HDR the 36 months period, first to 42 months period and then to 54 months period?; and

(b) whether the second respondent's decision is valid, especially when the applicants have been deprived of their right to be heard before the making of the second respondent's decision;

(iv) whether the first respondent's decision is valid:

(a) in view of reg. 11(1), (1A) and (1B) HDR; and

(b) when the applicants could not exercise their right to be heard before the first respondent's decision was made.

There is no previous Malaysian case which has decided on the validity of the first respondent's decision to extend a time period provided in the SPA;

(v) if the court quashes the first respondent's decision by way of a *certiorari* order, can the court remits the issue of extending the 36 months period to the first respondent under s. 2(2) HDA? This issue concerns the application of s. 44(1) of the Specific Relief Act 1950 (SRA); and

(vi) are the applicants entitled to claim LAD from the third respondent based on the 36 months period?

A **Does Regulation 12 HDR Bar Court's Judicial Power To Review First Respondent's Decision**?

[13] Regulation 12 HDR states as follows:

Appeal.

B *Notwithstanding anything to the contrary in these Regulations, any person aggrieved by the decision of the Controller under* paragraph (3) of regulation 3, paragraph (1) of regulation 4, paragraph (4) of regulation 5, paragraph (2) of regulation 9 or *paragraph (3) of regulation 11 may, within fourteen (14) days after having been notified of the decision of the Controller, appeal against such decision to the Minister; and the decision of the Minister made thereon shall be final*

C *and shall not be questioned in any court*.

(emphasis added).

[14] The question that arises is whether reg. 12 HDR can ousts the court's judicial power under art. 121(1) FC to review the first respondent's decision.

D **[15]** Article 4(1) FC reads as follows:

Supreme law of the Federation

4(1) **This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution**

E **shall, to the extent of the inconsistency, be void**.

(emphasis added).

Article 4(1) FC provides for the supremacy of FC as explained by Suffian LP (sitting alone) in the Federal Court case of *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112, at 113, as follows:

F *The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please*.

(emphasis added).

G **[16]** The term "law" in art. 4(1) FC has been defined in art. 160(2) FC as follows:

"law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;

H (emphasis added).

[17] Section 3 IA has defined "written law" as follows:

"written law" means:

(a) …;

I (b) **Acts of Parliament and subsidiary legislation made thereunder**; …

(emphasis added).

[18] By reason of the definitions of "law" (in art. 160(2) FC) and "written law" (in s. 3(b) IA), the doctrine of supremacy of FC (as embodied in art. 4(1) FC) requires all subsidiary legislation made under all Acts of Parliament to be consistent with the FC (the supreme law of the country). Accordingly, by virtue of art. 4(1) FC, any delegated legislation which is inconsistent with FC "shall, to the extent of the inconsistency, be void".

[19] The following two judgments of the Federal Court, both delivered by Zainun Ali FCJ, have held that the basic structure of FC includes the doctrine of separation of powers and the court's exclusive judicial power to decide disputes under art. 121(1) FC:

(i) *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat And Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561; and

(ii) *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545.

[20] It is decided in *Bank Kerjasama Rakyat Malaysia Bhd v. Koperasi Amanah Pelaburan Bhd* [2019] 1 LNS 1099; [2019] MLJU 754, at [34] and [35], as follows:

> [34] As explained above, there are conflicting decisions of our apex court on the application of the Basic Structure Doctrine. On the one hand, the Federal Court in *Kok Wah Kuan* has rejected the Basic Structure Doctrine. On the other hand, there is a trilogy of Federal Court judgments in *Sivarasa*, *Semenyih Jaya* and *Indira Gandhi* which has applied the Basic Structure Doctrine.
>
> [35] *In the Federal Court case of Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, at 14, Peh Swee Chin FCJ has held that when there are conflicting decisions of the Federal Court, the subsequent Federal Court decision should prevail over the earlier Federal Court decision. This is the first reason for me to adopt the approach expounded by the later Federal Court cases of Sivarasa, Semenyih Jaya and Indira Gandhi. There is a second reason for me to apply the later approach decided by the Federal Court - I am attracted to the reasoning regarding the Basic Structure Doctrine which upholds the Rule of Law and protects fundamental liberties.*
>
> (emphasis added).

[21] Section 73(b) of Perumahan Rakyat 1Malaysia Act 2012 (PRIMA) provides that no "action, suit, prosecution or other proceedings shall lie or be brought, instituted or maintained in any court" against Perbadanan Prima Malaysia, a statutory body established under PRIMA. In *Barisan Arena Sdn Bhd v. Perbadanan Prima Malaysia* [2019] 1 LNS 1773; [2019] 7 AMR 139, at [22], I have followed *Semenyih Jaya* and *Indira Gandhi* as follows:

> [22] **If s. 73(b) PR1MA excludes the court's jurisdiction from deciding This Action**:
>
> (1) **s. 73(b) PR1MA has altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under Article 121(1) of the Constitution (Alteration)**;

A (2) **the Alteration has encroached into the exclusive domain of the court's judicial power**;

(3) **s. 73(b) PR1MA is invalid under Article 4(1) of the Constitution to the extent of the Alteration; and**

B (4) **in view of the aforesaid invalidity of s 73(b) PR1MA, the court has jurisdiction to determine This Action**.

(emphasis added).

[22] Based on *Semenyih Jaya* and *Indira Gandhi*, I am of the following view regarding the part of reg. 12 which states that the "decision of the Minister C ... shall be final and shall not be questioned in any court" (impugned part):

(i) the impugned part has ousted the court's judicial power under art. 121(1) FC to review the validity of any decision of the Minister on appeal to the Minister against a decision of the Controller of Housing made pursuant to regs. 3(3), 4(1), 5(4), 9(2) and 11(3) HDR;

D

(ii) the impugned part has altered the basic structure of FC regarding the doctrine of separation of powers between the Executive, Legislature and Judiciary (alteration) by encroaching into the exclusive domain of the court's judicial power under art. 121(1) FC; and

E (iii) the impugned part is invalid pursuant to art. 4(1) FC only to the extent of the alteration (inconsistency with art. 121(1) FC). Consequently, the court has the judicial power under art. 121(1) FC to decide these three applications regarding the validity of the first respondent's decision.

[23] There is a second reason for invalidating the impugned part. The F impugned part deprives the applicants of their fundamental right of access to justice (fundamental access to justice) as guaranteed by art. 5(1) FC. Article 5(1) FC provides that no person shall be deprived of his or her life or personal liberty save in accordance with law. In the Federal Court case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, at [4], G Gopal Sri Ram FCJ has explained fundamental access to justice in art. 5(1) FC as follows:

> [4] *Article 5(1)* may be selected to illustrate the point that is sought to be made since it is one of the provisions relied on in this case. *That article proscribes the deprivation of life or personal liberty, save in accordance with law*. "Law" wherever mentioned in Part II of the Constitution includes - by H statutory direction - the common law of England (see art. 160(2) read with s. 66 of the Consolidated Interpretation Acts of 1948 & 1967). *It is now well settled that by the common law of England the right of access to justice is a basic or a constitutional right. See, Raymond v. Honey* [1983] 1 AC 1, 13; *R v. Secretary of State for the Home Department, ex parte Leech* [1993] All ER 539. I In *Thai Trading Co (a firm) v. Taylor* [1998] 3 All ER 65 at 69, *Millett LJ described it as a fundamental human right. Thus, the common law right of access*

to justice is part of the "law" to which art. 5(1) refers. In other words, a law that seeks to deprive life or personal liberty (both concepts being understood in their widest sense) is unconstitutional if it prevents or limits access to the courts.

(emphasis added).

The impugned part denies the applicants of their fundamental access to justice as enshrined in art. 5(1) FC. As such, the impugned part is inconsistent with art. 5(1) FC and is thus invalid to the extent of such an inconsistency as provided in art. 4(1) FC.

[24] A third reason for invalidating the impugned part is based on the *ultra vires* doctrine as provided in s. 23(1) IA. Section 23(1) IA provides as follows:

23(1) **Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency**.

(emphasis added).

Section 23(1) IA is in Part 1 of IA and applies to HDR by virtue of s. 2(1)(e) IA because HDR are made after 31 December 1968 under HDA (which has been revised under the Revision of Laws Act 1968). The scope of s. 23(1) IA has been explained by Mohd Zawawi Salleh FCJ in the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2020] 1 CLJ 1, at [81], as follows:

[81] **It is trite that subsidiary or delegated legislation shall not be broader than the enabling legislation. This general principle of statutory interpretation is codified in s. 23 [IA]**. ...

(emphasis added).

[25] The title to HDR has expressly stated that the first respondent has made HDR pursuant to s. 24 HDA. I reproduce below s. 24 HDA which confers statutory power on the first respondent to make HDR:

Powers to make regulations.

24(1) **Subject to this section, the Minister may make regulations for the purpose of carrying into effect the provisions of this Act**.

(2) **In particular and without prejudice to the generality of the foregoing power, the regulations may**:

(a) regulate the advertisements of a licensed housing developer;

(b) regulate the use of names of housing estates developed by a licensed housing developer;

(c) prescribe the form of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise;

(d) regulate payments (under whatever name these may be described) which may be made by a purchaser either before, during or after the construction or completion of the house, flat or other accommodation

A for which that purchaser is required to make the payments, including the amount of the payments, the time when the payments become due and conditions that shall be fulfilled by a licensed housing developer before he may ask for the payments;

(e) regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser;

(f) prescribe the fees which are payable under this Act;

(g) prescribe that any act or omission in contravention of any of the regulations shall be an offence and provide for the penalties therefor either by way of fine or imprisonment or both: provided that any fine so provided shall not exceed fifty thousand ringgit and a term of imprisonment so provided shall not exceed five years, and in addition thereto may also provide for the cancellation and suspension of a licence issued under this Act;

(h) prescribe the moneys which shall be paid into or withdrawn from the Housing Development Account and the conditions for such withdrawals;

(i) prescribe offences which may be compounded and the forms to be used in and the method and the procedure for compounding such offences;

(ia) provide for an exemption from the operation of this Act of such housing developer or housing accommodation as the Minister deems expedient and prescribe the form, limitations, restrictions or conditions of such exemption; and

(j) provide for any matter which under this Act is required or permitted to be prescribed or which is necessary or expedient to be prescribed to give effect to this Act.

(emphasis added).

Sections 24(1) and (2)(a) to (j) HDA do not expressly empower the first respondent to make a subsidiary legislation which ousts the court's jurisdiction to decide any decision of the first respondent. I am also unable to find that by necessary implication, s. 24(1) and (2)(a) to (j) HDA enable the first respondent to make the impugned part. Furthermore, I am of the view that in providing for s. 24(1) and (2)(a) to (j) HDA, it is inconceivable for Parliament to have intended for the first respondent to make delegated legislation which encroaches into the court's judicial power enshrined in art. 121(1) FC. Accordingly, both literal and purposive interpretations of s. 24(1) and (2)(a) to (j) HDA do not enable the first respondent to make the impugned part in reg. 12 HDR. As such, the impugned part is:

(i) *ultra vires* s. 24(1) and (2)(a) to (j) HDA; and

(ii) void under s. 23(1) IA.

Whether *Ang Ming Lee* Has Retrospective Or Prospective Effect

[26] The third respondent's learned counsel has contended that the Federal Court's decision in *Ang Ming Lee* only applies prospectively. As such, according to the third respondent's learned counsel, *Ang Ming Lee* does not apply to these three applications (which have been filed before the delivery of the Federal Court's judgment in *Ang Ming Lee*).

[27] I am of the following view:

(i) generally, a written judgment has retrospective effect (general rule). The general rule is demonstrated in the following judgment of Lord Reid in the House of Lords in *Birmingham Corporation v. West Midland Baptist (Trust) Association (Inc)* [1969] 3 All ER 172, at 180 (regarding the interpretation of provisions in the then United Kingdom's Acquisition of Land (Assessment of Compensation) Act 1919):

> *We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that the rule as to the date of the notice to treat is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed*.
>
> (emphasis added)

(ii) an exception to the general rule has been laid down in *PP v. Dato Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311. In *Dato Yap Peng*, at pp. 291-292 (CLJ); pp. 320-321 (MLJ), Abdoolcader SCJ gave the following judgment in the 3-2 majority decision of the Supreme Court:

> *I would accordingly declare that section 418A is in violation of the provisions of art. 121(1) and therefore unconstitutional and void under the provisions of art. 4(1). The Deputy submits that any such pronouncement will create chaos as the section in question has been resorted to and trials held in the High Court as a result. The section has indeed been implemented and convictions and acquittals secured as a result over a span of some eleven years in view of the decision in the Hongkong Bank case, and it will therefore be necessary in these circumstances to apply the doctrine of prospective overruling in this case*.
>
> …
>
> *At the conclusion of argument on March 19, 1987, the Court accordingly by a majority (Tun Mohamed Salleh Abas L.P., and Tan Sri Hashim Yeop A. Sani S.C.J. dissenting) declared section 418A to be unconstitutional and void as being an infringement of the provisions of art. 121(1) and applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis.*
>
> (emphasis added)

In *Dato Yap Peng*, the majority decision of the Supreme Court gave prospective effect to its decision regarding the unconstitutionality of the then s. 418A of the Criminal Procedure Code (first exception). The first exception was applied so as to ensure that convictions and acquittals prior to the Supreme Court's decision in *Dato Yap Peng* were not affected;

(iii) there is a second exception to the general rule (second exception). According to the second exception, the court may decide in exceptional circumstances that its decision regarding:

(a) the validity or effect of a provision of written law; or

(b) a certain position at common law (case law)

can only have prospective effect. In support of the second exception, I refer to the Federal Court's judgment delivered by Richard Malanjum CJ (Sabah & Sarawak) (as he then was) in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 AMR 497. In *Sinnaiyah & Sons Sdn Bhd*, at [48]-[53], the Federal Court overruled earlier decisions of the Federal Court and held that an allegation of fraud, even if such an allegation concerns "criminal fraud", need only be proven on a balance of probabilities and not beyond all reasonable doubt. The Federal Court has expressly applied the doctrine of prospective overruling in *Sinnaiyah & Sons Sdn Bhd*, at [54], as follows:

> *[54] However, we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims.*
>
> (emphasis added); and

(iv) the first and second exceptions which form the doctrine of prospective overruling, can only apply in exceptional circumstances. In this regard, I rely on the decision of a seven-member coram of the House of Lords in *Re Spectrum Plus Ltd; National Westminster Bank Plc v. Spectrum Plus Ltd & Ors* [2005] 4 All ER 209 as follows:

(a) Lord Nicholls held as follows, at [40] (concurred by Lord Steyn, at [45], Lord Walker, at [161], and Baroness Hale, at [162]):

> [40] *Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.*
>
> (emphasis added)

(b) Lord Hope decided as follows, at [74] (concurred by Lord Walker, at [161], and Baroness Hale, at [162]):

> *[74] Where the future may lead us we cannot tell. So, like my noble and learned friend Lord Nicholls, I would not rule out the possibility that in a wholly exceptional case the interests of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively. …*

(emphasis added); and

(c) Lord Scott gave the following judgment, at [126]:

> *[126] Lord Nicholls has reviewed in depth the jurisprudential pros and cons of a prospective overruling and has concluded that, even where interpretation and application of a statute is the issue, the door should be kept open for the possibility of such a ruling in an exceptional case (see [39], above). I would respectfully agree with his comment about the wisdom of a 'never say never' approach but find myself unable to visualise circumstances in which it would be proper for a court, having reached a conclusion as to the correct meaning of a statute, to decline to apply to the case in hand the statute thus construed. …*
>
> (emphasis added).

[28] Tengku Maimun binti Tuan Mat CJ delivered the following judgment of the Federal Court in *Ang Ming Lee*, at [19], [25], [26], [36], [40], [55], [56] and [60]:

> [19] *Leave to appeal was granted to the purchasers on the following questions of law*:
>
> (i) *whether the [Controller of Housing] has the power to waive or modify any provision in the Schedule H Contract of Sale as prescribed by the Minister under the [HDA] ("Question 1")*;
>
> (ii) *whether section 24 [HDA] confers power on the Minister to make regulations for the purpose to delegate the power to waive or modify the Schedule H Contract of Sale to the [Controller] ("Question 2")*;
>
> …
>
> [25] *Section 24(2) [HDA] empowers the Minister to prescribe the statutory form of contract for the sale and purchase agreement between the developer and the purchasers and to regulate the terms and conditions of the contract of sale. Pursuant to subsection 24(2) [HDA], the Minister promulgated [HDR] prescribing the statutory form for the contract of sale in Schedule H together with the conditions and terms of such contract*.
>
> [26] *Having prescribed the Statutory Form H and the terms and conditions for the contract of sale, the Minister by regulation 11(3) [HDR] then empowers the Controller to waive or modify the conditions and terms of the contract of sale as prescribed in Schedule H. This begs the question whether by empowering the Controller to waive or modify the conditions and terms of the contract, the Minister has exceeded the scope*

of the authority conferred on him by the legislature? In other words, by empowering the Controller, through regulation 11(3), has there been an act of sub-delegation by the Minister to the Controller which is ultra vires [HDA]?

…

[36] *By s 24(2)(e) [HDA], the Minister is empowered or given the discretion by Parliament to regulate and prohibit the terms and conditions of the contract of sale. As opined by the learned authors in De Smith's Judicial Review, a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but the presumption may be rebutted, by any contrary indication found in the language, scope or object of the Act. In our view, having regard to the object and purpose of [HDA], the words "to regulate and to prohibit" in subsection 24(2)(e) should be given a strict construction, in the sense that the Minister is expected to apply his own mind to the matter and not to delegate that responsibility to the Controller.*

…

[40] *[HDA] being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of [HDA] that such duty to safeguard the interests of the purchasers may be delegated to some other authority.*

…

[55] *Finally, on the third task. In the instant appeals, the Schedule H contract of sale prescribed by [HDR] is to carry into effect the provisions of [HDA], which is to protect the interests of the purchasers. The [HDR] made by the Minister must thus achieve the object of protecting the interests of the purchasers and not the interests of the developers. And at the risk of repetition, the duty to protect the interests of the purchasers is entrusted to the Minister.*

[56] *By delegating the power, vide regulation 11(3) to the Controller to waive or modify the prescribed terms and conditions of the sale of contract, it is now the Controller who has been entrusted to regulate the terms and conditions of the contract of sale. Further, by modifying the prescribed terms and conditions and by granting the developer the extension of time, the Controller has denied the purchasers' right to claim for LAD. This modification and the granting of extension of time to the developer, does not appear to us to protect or safeguard the purchasers but rather the developer and this militates the intention of Parliament.*

…

[60] *On the above analysis, we hold that the Controller has no power to waive or modify any provision in the Schedule H contract of sale because section 24 [HDA] does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H contract of sale to the Controller. And it is not open to us to read into the section an implied power enabling the Minister*

to do so. We consequently hold that regulation 11(3) [HDR], conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is ultra vires [HDA].

(emphasis added).

[29] I am not able to accept the third respondent's submission that the judgment in *Ang Ming Lee* can only have prospective effect. My reasons are as follows:

(i) the Federal Court in *Ang Ming Lee* has not expressly ruled that its decision can only have prospective effect. Hence, in accordance with the general rule, the judgment in *Ang Ming Lee* has retrospective effect and applies to these three applications; and

(ii) there are no exceptional circumstances for the doctrine of prospective overruling to apply to the decision in *Ang Ming Lee*. On the contrary, as held in many cases (including *Ang Ming Lee)*, the object of HDA and HDR is to protect a "homebuyer" (as defined in s. 16A HDA). Accordingly, in line with the purpose of HDA and HDR, it is in the interest of homebuyers for the judgment in *Ang Ming Lee* to be given retrospective effect.

Whether Second Respondent Can Extend 36 Months Period

[30] As a matter of *stare decisis*, the Federal Court's judgment in *Ang Ming Lee* is binding on me. Premised on *Ang Ming Lee*, reg. 11(3) HDR is invalid and the second respondent cannot therefore exercise any power under reg. 11(3) HDR to extend the 36 months period (prescribed in Schedule H) to:

(i) 42 months period (second respondent's first extension); and

(ii) 54 months period (second respondent's second extension).

[31] In addition to *Ang Ming Lee*, there is another reason to invalidate the second respondent's first and second extensions. I am of the view that reg. 11(3) HDR (the basis for the second respondent's first and second extensions) cannot be an exception to the SPA prescribed in reg. 11(1) HDR (statutory SPA). I reproduce below reg. 11(1), (1A), (1B) and (3) HDR:

Contract of sale

11(1) *Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.*

(1A) Notwithstanding paragraph (1), every contract of sale for build then sell for a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule

A I and where the contract of sale for build then sell is for the sale and purchase of a housing accommodation in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule J;

(1B) Subregulations (1) and (1A) shall not apply if at the time of the
B execution of the contract of sale, the certificate of completion and compliance for the housing accommodation has been issued and a certified true copy of which has been forwarded to the purchaser.

…

(3) *Where the Controller is satisfied that owing to special circumstances or hardship*
C *or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions*:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing
D *over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.*

(emphasis added).

Firstly, reg. 11(1) HDR which prescribes for the statutory SPA is a mandatory provision. This is clear from the use of the mandatory term
E "shall" in reg. 11(1) HDR - please see *Sri Damansara Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Ors* [2020] MLJU 170, at [22]. There are only two exceptions to reg. 11(1) HDR, namely reg. 11(1A) (Notwithstanding para. (1)) and 11(1B) HDR (Su-reg. (1) … shall not apply). There is nothing in reg. 11(3) HDR which provides that the reg. 11(3) HDR shall override the
F statutory SPA as prescribed mandatorily by reg. 11(1) HDR. Accordingly, the second respondent cannot invoke reg. 11(3) HDR to "waive or modify" the 36 months period in the statutory SPA.

[32] The second respondent's first extension was given before the signing of the SPAs in these three applications. The second respondent's second
G extension was however granted after the conclusion of the SPAs in these three applications. Hence, there is an additional ground to invalidate the second respondent's second extension - the second respondent should have given all purchasers of parcels in the building (not only the applicants) a right to be heard before deciding on the second respondent's second extension.
H This was the basis of the Court of Appeal's judgment delivered by Harmindar Singh JCA in *Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Ang Ming Lee & Ors And Other Appeals* [2018] 9 CLJ 640, at [24] and [25], as follows:

Whether The Purchasers Were Entitled To A Right To Be Heard

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[24] *The final issue raised before us in arguments was whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister. In this respect, we note that the purpose of the Act was to protect*

the interest of the purchasers. As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made.

[25] *As the purchasers comprise a group which can easily be ascertained, they should at least be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before any such decision is taken. As no such right to be heard was afforded to the purchasers, it is our judgment that the decision made in this case, whether by the Controller or Minister, was null and void and of no effect and should accordingly be set aside.*

(emphasis added).

[33] The issue regarding the legality of the second respondent's first extension was raised by the court and not by the applicants or respondents. Having said that, the question of illegality can be raised at any time. It is decided in *Sri Damansara*, at [20], as follows:

[20] *It is to be emphasised that even if parties and their learned counsel do not allude to any illegality, the court is duty bound to take cognizance of an illegality. It is contrary to public policy for the court to allow an illegality to be perpetrated. In Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd [1989] 1 MLJ 457, at 460-462, the breach of s. 5(1) HDA was only raised for the very first time during the hearing of the appeal before the Privy Council. Despite the fact that the illegality issue had not been pleaded and raised in the High Court and the then Federal Court, the Privy Council in a judgment delivered by Lord Oliver, allowed such a question to be raised. The Privy Council then remitted the illegality issue to be considered by our Supreme Court (at the time of the decision of the Privy Council, appeals to the Privy Council for civil matters had been abolished and our Supreme Court had already been inaugurated as the apex court). Needless to say, learned counsel are duty bound as officers of the court to administer justice and to draw the attention of the court to any issue of illegality at the earliest opportunity.*

(emphasis added).

Is First Respondent's Decision Valid?

[34] I am not able to find any previous Malaysian case which has decided on the validity of the first respondent's decision to extend a time period provided in a statutory SPA.

[35] I am of the view that the first respondent has no power under HDR to extend the 36 months period. This decision is premised on the following reasons:

(i) as explained in the above para. [31], reg. 11(1) HDR (which prescribes for the statutory SPA) is only subject to reg. 11(1A) and (1B) HDR. There is nothing in HDR which empowers the first respondent to extend the 36 months period in the statutory SPA. Accordingly, there is no lawful basis to make the first respondent's decision and the first respondent's decision constitutes an illegality (illegality); and

(ii) even if it is assumed that the first respondent has power under HDR to extend the 36 months period, in accordance with the Court of Appeal's decision in *Ang Ming Lee*, the first respondent should have given all purchasers of parcels in the building (not only the applicants) a right to be heard before making the first respondent's decision. Hence, there was procedural impropriety when the first respondent's decision was made (procedural impropriety).

[36] It is trite law that the court has a discretionary power to issue an order of *certiorari* to quash a decision of a public authority if, among others, the decision is illegal or involves a procedural impropriety - please see the Federal Court's judgment delivered by Raus Sharif FCJ (as he then was) in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629, at [15]. In view of the illegality and procedural impropriety (please see the above sub-paras. 35(i) and (ii)), I have no hesitation to exercise my discretion to issue a *certiorari* order to quash the first respondent's decision.

Whether Third Respondent Can Rely On Section 2(2) HDA

[37] The third respondent's learned counsel has submitted that if the court quashes the first respondent's decision, the court should remit the question of extending the 36 months period to the first respondent under s. 2(2) HDA (remittance order). Section 2(2) HDA provides as follows:

> 2(2) *The Minister may by order published in the Gazette exempt any housing developer or housing accommodation from any or all of the provisions of this Act and such exemption may be granted for such duration as may be specified in the order, and may be made subject to such limitations, restrictions or conditions as the Minister may specify in the order.*
>
> (emphasis added)

[38] I am not able to make the remittance order due to the following reasons:

(i) the learned Senior Federal Counsel (SFC) (who represented the first respondent in these three applications) did not make any application for the remittance order. Such a course of action by the learned SFC, in my view, is proper and highly commendable; and

(ii) the remittance order is in effect a court order of *mandamus* to compel the first respondent to consider exercising the first respondent's powers under s. 2(2) HDA. The court may issue a *mandamus* order if the conditions as specified in provisos (a) to (e) of s. 44(1) SRA are fulfilled cumulatively - please see the judgment of Abdul Hamid Mohamad CJ in the Federal Court case of *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641, at [13]. Section 44(1) SRA provides as follows:

Power to order public servants and others to do certain specific acts

44(1) **A Judge may make an order requiring any specific act to be done** or forborne, **by any person holding a public office, whether of a permanent** or a temporary **nature**, or by any corporation or any court subordinate to the High Court:

Provided that:

(a) **an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act**;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) **in the opinion of the Judge the doing or forbearing is consonant to right and justice**;

(d) the applicant has no other specific and adequate legal remedy; **and**

(e) the remedy given by the order applied for will be complete.

(emphasis added)

This court cannot issue a *mandamus* order in these three applications because the following two conditions of s. 44(1) SRA are not fulfilled:

(a) proviso (a) to s. 44(1) SRA is not satisfied as no application for the remittance order has been made by a person "whose property, franchise, or personal right would be injured by the … doing, as the case may be, of the said specific act"; and

(b) the remittance order is not consonant to "right and justice" as required by proviso (c) to s. 44(1) SRA. This is because if the court has granted the remittance order, this will defeat the applicants' rights under the statutory SPA (regarding the 36 months period) which has been prescribed mandatorily by reg. 11(1) HDR.

Can Applicants Claim For LAD Based On 36 Months Period?

[39] As explained in paras 30-36 above, neither the first respondent nor the second respondent has power under HDR to extend the 36 months period.

[40] It is not disputed that the High Court has a wide discretionary power to grant a declaration under s. 41 SRA and O. 15 r. 16 of the Rules of Court 2012 (RC).

[41] I exercise my discretion under s. 41 SRA and O. 15 r. 16 RC to grant a declaration that the applicants are entitled to claim LAD based on the 36 months period. The reasons for the exercise of this discretion are as follows:

(i) by reason of reg. 11(1) HDR, the 36-month period has been prescribed mandatorily in the statutory SPA. If the applicants are not entitled to claim LAD premised on the 36 months period, the mandatory effect of reg. 11(1) HDR will be circumvented; and

(ii) the object of HDA and HDR is to protect homebuyers. One manner to achieve this object is to ensure that the terms and conditions of the SPA are not drafted in a lopsided manner which favours unjustly housing developers (at the expense of homebuyers). Hence, the statutory SPA is provided in reg. 11(1) HDR. If the above declaration is not granted, the above object of HDA and HDR will be defeated.

Validity Of Remaining Part Of Regulation 12 HDR

[42] I should clarify that other than the impugned part, the remaining part of reg. 12 (which provides for a right to appeal to the first respondent against the second respondent's decision under regs. 3(3), 4(1), 5(4) and 9(2) HDR) is still valid and enforceable.

Summary Of Court's Decision

[43] In brief:

(i) the impugned part of reg. 12 HDR is invalid:

(a) under art. 4(1) FC because:

(1) the impugned part has ousted the court's judicial power under art. 121(1) FC to review the legality of the first respondent's decision and has thereby altered the basic structure of FC (which includes the doctrine of separation of powers); and

(2) the impugned part deprives the applicants of their fundamental access to justice as provided in art. 5(1) FC; and

(b) pursuant to s. 23(1) IA because the impugned part is *ultra vires* s. 24(1) and (2)(a) to (j) HDA;

(ii) in view of the invalidity of the impugned part, the court has judicial power under art. 121(1) FC to decide these three applications;

(iii) the judgment in *Ang Ming Lee* has retrospective effect and applies to the three applications;

(iv) the second respondent cannot extend the 36 months period because:

(a) as decided in *Ang Ming Lee*, reg. 11(3) HDR is invalid and the second respondent cannot therefore exercise any power under reg. 11(3) HDR to extend the 36 months period;

(b) regulation 11(1) HDR is only subject to reg. 11(1A) and (1B) HDR. Hence, the second respondent has no power under reg. 11(3) HDR to extend the 36 months period as prescribed mandatorily by reg. 11(1) HDR; and

(c) all purchasers of parcels in the building (including the applicants) had been deprived of their right to be heard before the making of the second respondent's decision;

(v) the first respondent's decision is invalid because:

(a) the first respondent has no power under HDR to extend the 36 months period as provided mandatorily in reg. 11(1) HDR; and

(b) the first respondent has deprived all purchasers of parcels in the building (including the applicants) of their right to be heard before the first respondent's decision is made;

(vi) the court cannot issue a *mandamus* order and make the remittance order because provisos (a) and (c) of s. 44(1) SRA are not fulfilled; and

(vii) by virtue of the statutory SPA as prescribed mandatorily in reg. 11(1) HDR, the applicants entitled to claim LAD from the third respondent based on the 36 months period.

[44] Premised on the above reasons, the following orders are made by this court, among others:

(i) an order of *certiorari* is granted to quash the first respondent's decision;

(ii) the following declarations are given:

(a) reg. 11(3) HDR is invalid;

(b) the impugned part of reg. 12 HDR is invalid;

(c) the third respondent shall be bound by the 36 months period as provided in Schedule H; and

(d) applicants can claim LAD based on the 36 months period; and

(iii) two sets of costs of the three applications shall be paid to the applicants by:

(a) the first and second respondents; and

(b) the third respondent.

A **[45]** I must record my gratitude to all learned counsel in these three applications for their able submission.

[46] In closing, the court should give effect to the object of HDA and HDR which is to protect the interest of homebuyers in the statutory SPAs.

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